EDITOR'S NOTE

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89-7370

No. 89-

ORIGINAL

IN THE UNITED STATES SUPREME COURT

October Term, 1989

MOSHE GOZLON-PERETZ

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to 28 U.S.C. § 1915, this Court's Rule 39.4, and 18 U.S.C. § 3006A(d)(6), the petitioner, Moshe Gozlon-Peretz, moves for leave to proceed in forma pauperis. In support of his motion, he states:

1. This proceeding is a petition for a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Third Circuit, dated January 25, 1990, and January 9, 1989, affirming his convictions in the United States District Court for the District of New Jersey and remanding for imposition of terms of supervised releases as part of the judgment of sentence imposed at resentencing.

58

2. The petitioner is unable to pay the fees and costs for this petition or to give security therefor.

3. By leave of court, the petitioner proceeded at resentencing and on appeal from resentencing in forma pauperis. Undersigned counsel was appointed to represent the petitioner under the Criminal Justice Act by Order of the court of appeals dated April 10, 1990, as substitute counsel.

4. There has been no substantial favorable change in the petitioner's financial condition since the time of resentencing.

WHEREFORE, petitioner prays that this Court grant his leave to proceed in this Court in forma pauperis.

Respectfully submitted,
THE PETITIONER

Dated: April 25, 1990

By: PETER GOLDBERGER
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Philadelphia, PA 19107
(215) 923-1300

Attorney for the Petitioner

No. 89-

IN THE UNITED STATES SUPREME COURT

October Term, 1989

MOSHE GOZLON-PERETZ,

Petitioner,

v.

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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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April 1990

QUESTIONS PRESENTED

1. Is either a Special Parole Term or a term of Supervised Release a part of the sentence required to be imposed for a higher-volume federal heroin offense committed in February 1987?

2. Where the statements of an alleged coconspirator are offered in evidence against a federal criminal defendant, does Fed.R. Evid. 801(d)(2)(E) require a preliminary showing that the two had agreed to a shared criminal objective or is it sufficient that the two were merely participants in some joint venture?

3. Is 18 U.S.C. § 3013, requiring imposition of a $50 Special Assessment as part of the sentence for every federal offense, invalid as a revenue raising measure enacted in contravention of the Origination Clause of the United States Constitution?

TABLE OF CONTENTS[1]

1.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Moshe Gozlon-Peretz and the United States). Ellus Yehuda and Yaffa Levy were codefendants in the district court and were parties to the initial direct appeal. Neither was a party to the appeal after resentencing on remand, and neither is a party to this petition.

INDEX TO APPENDIX

TABLE OF AUTHORITIES

CASES

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOSHE GOZLON-PERETZ respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on January 25, 1990, requiring the imposition on him of a term of supervised release in this pre-Sentencing Reform Act case, and also (as to one issue) the judgment and opinion of the Court of Appeals entered on January 9, 1989, affirming his convictions in the District of New Jersey for controlled substance offenses.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit on appeal after remand, as to the sentencing issue, filed on January 25, 1990, is published as United States v. Gozlon-Peretz, 894 F.2d 1402 (3d Cir. 1990). It is Appendix A to this petition. The Opinion of the United States Court of Appeals for the Third Circuit affirming the convictions on direct appeal, filed on January 9, 1989, is published sub nom. United States v. Levy, 865 F.2d 551 (1989) (en banc). Appendix B. There is no published opinion of the District Court. The Judgment and Commitment Order of the district court (Hon. John F. Gerry, Ch.U.S.D.J.), dated and filed April 14, 1989, imposing sentence after remand, is Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit vacating the term of Special Parole and remanding for entry of a term of Supervised Release was entered on January 25, 1990. This petition is filed within 90 days of that date. Rule 13.1 (1990 rev.). The judgment of the United States Court of Appeals for the Third Circuit affirming the petitioner's convictions on direct appeal was entered January 9, 1989. As to one issue decided there, the petitioner also invokes this Court's discretion to review an issue resolved on that earlier appeal after the time set forth by Rule of Court, see Schacht v. United States, 398 U.S. 58, 63-64 (1970); see generally R.Stern, E. Gressman & S.Shapiro, Supreme Court Practice 306-10 (6th ed. 1985). It was in the interests of judicial economy and conservation of this Court's resources that the petitioner await resentencing on remand before deciding whether to petition on the merits of his convictions. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISION INVOLVED

Between 1970 and October 12, 1984, 21 U.S.C. § 841(b) provided the penalties for drug distribution charges, in the following terms:

> (b) Except as provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. ... Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of ... a prior conviction [for a federal drug felony], impose a special parole term of at least 3 years in addition to such term of imprisonment ....

The **Controlled Substances Penalties Amendments Act of 1984, Pub.L. 98-473, ch. V, § 502, 98 Stat. 2068**, effective October 12, 1984, provided, in pertinent part:

> Sec. 502. Subsection (b) of section 401 of the Controlled Substances Act (21 U.S.C. 841(b)) is amended --
>
> (1) in paragraph (1), by --
>
> (A) redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively, and inserting after "(1)" a new subparagraph to read as follows:
>
> "(A) In the case of a violation of subsection (a) of this section involving --
>
> "(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug [other than cocaine and related substances] ...;
>
> "(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug [i.e., a kilo or more of cocaine];
>
> ....
>
> such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. ..."

As a result of the 1984 amendments, from **October 12, 1984, until October 27, 1986, 21 U.S.C. § 841(b)(1)(A)**, provided:

> (1)(A) In the case of a violation of subsection (a) of this section involving --
>
> (i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance

containing a detectable amount of a narcotic drug other than a narcotic drug consisting of --

(I) coca leaves;
(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or
(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both[.]

The **Anti-Drug Abuse Act of 1986, Pub.L. 99-570, § 1002, Title I, Subtitle A (Narcotics Penalties and Enforcement Act of 1986), 100 Stat. 3207-2**, provides, in relevant part:

Section 401(b)(1) of the controlled Substances Act (21 U.S.C. 841(b)(1)) is amended --

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by striking out subparagraphs (A) and (B) and inserting the following in lieu thereof:

"(1)(A) In the case of a violation of subsection (a) of this section involving --

"(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
"(ii) 5 kilograms or more of [cocaine];
"(iii) 50 grams or more of [cocaine base or "crack"];
....

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life ..., a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual ..., or both. ... Any sentence under this subparagraph shall, in the absence of such prior conviction [for certain drug felonies], impose a term of supervised release of at least 5 years in addition to such term of imprisonment .... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

"(B) In the case of a violation of subsection (a) of this section involving --

"(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin; ...

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years .... Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction [for certain drug felonies], include a term of supervised release of at least 4 years in addition to such term of imprisonment .... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

As a result of the 1986 amendments, **between October 27, 1986, and November 1, 1987, and for some time thereafter, 21 U.S.C. § 841(b)** provided:

(b) [Subject to an irrelevant exception], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving --

(i) [1 kilo or more of any heroin mixture];
(ii) [5 kilos or more of any cocaine mixture];
(iii) [50 grams or more of any cocaine base or "crack"];

....

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life .... Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition such such term of imprisonment ....

(B) In the case of a violation of subsection (a) involving --

(i) [100 grams or more of any heroin mixture];
(ii) [500 grams or more of any cocaine mixture];
(iii) [5 grams or more of any cocaine base or "crack"];

....

such person shall be sentence to a term of imprisonment which may not be less than 5 years and not more than 40 years .... Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment ....

The **Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1004-1005, 100 Stat. 3207-6**, provides, in pertinent part:

Sec. 1004. Elimination of Special Parole Terms.

(a) The Controlled Substances Act and the Controlled Substances Import and Export Act are amended by striking out "special parole term" each place it appears and inserting "term of supervised release" in lieu thereof.

(b) The amendments made by this section shall take effect on the date of the taking effect of section 3583 of title 18, United States Code.

Sec. 1005. Amendment to the Comprehensive Crime Control Act of 1984.

(a) Subsection (a) of section 224 of the Comprehensive Crime Control Act of 1984 is amended --

....

(2) by striking out paragraphs (1), (2), (3), and (5) and redesignating the other paragraphs accordingly.

....

The **Comprehensive Crime Control Act of 1984, ch. II (Sentencing Reform Act of 1984), Pub.L. 98-473, § 224, 98 Stat. 2030**, referred to in § 1005 of the 1986 Act, supra, provides, in pertinent part:

Sec. 224. The Controlled Substances Act (21 U.S.C. § 801 et seq.) is amended as follows:

(a) Section 401 (21 U.S.C. 841) is amended --

(1) in subsection (b)(1)(A), by deleting the last sentence;

....

In pertinent part, **18 U.S.C. § 3013 (Special assessment on convicted persons)** provides:

(a) The court shall assess on any person convicted of an offense against the United States --

(1) in the case of a misdemeanor --

(A) the amount of $25 if the defendant is an individual; and ...

(2) in the case of a felony --

(A) the amount of $50 if the defendant is an individual ....

(b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

As currently in effect, **42 U.S.C. § 10601** provides in relevant part:

(a) Establishment. There is created in the Treasury a separate account to be known as the Crime Victims Fund (hereinafter in the chapter referred to as the "Fund").

(b) Fines deposited in Fund; penalties; forfeited appearance bonds. ... there shall be deposited in the Fund --

(1) all fines that are collected from persons convicted of offenses against the United States ....

(2) penalty assessments collected under section 3013 of title 18 of the United States Code;

....

(c) Excess over $110 million; deposited in general fund of the Treasury; time limitation on deposit. (1) If the total deposited in the Fund during a particular fiscal year reaches the sum of $110 million, the excess over that sum shall be deposited in the general fund of the Treasury and shall not be a part of the Fund.

....

Federal Rule of Evidence 801(d)(2) provides, in pertinent part:

A statement is not hearsay if -- ... (2) **Admission of party opponent.** The statement is offered against a party and is ... (D) a statement by the party's agent ... concerning a matter within the scope of the agency ..., made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Article I, Section 7, Clause 1 of the United States Constitution provides that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

STATEMENT OF THE CASE

This petition arises from a case involving an alleged conspiracy to distribute heroin in New Jersey in February of 1987. The trial was held in May of 1987.

a. Procedural History

After a jury trial in the United States District Court for the District of New Jersey (the Hon. John F. Gerry, Chief U.S.

D.J., presiding), petitioner Moshe Gozlon-Peretz and his co-defendant Yaffa Levy were convicted on May 21, 1987, of all three Counts in an indictment charging conspiracy, possession (or aiding and abetting possession) with intent to distribute two kilograms of heroin on February 26, 1987, and aiding and abetting distribution of a separate 240 grams of heroin on that date, in violation of 21 U.S.C. §§ 841(a)(1), 846.[2]

The original sentencing hearings were held (for all three codefendants) on August 14, 1987. Regarding the petitioner, Chief Judge Gerry imposed sentence on Count 3 of 20 years' imprisonment, a Special Parole Term of five years, a committed fine of $200,000, and a $50 Special Assessment. The court imposed concurrent 20 year terms on Counts 1 and 2, a concurrent Special Parole Term on Count 2, and additional Special Assessments.

Petitioner Gozlon and codefendant Levy appealed their convictions and sentences, and codefendant Yehuda appealed the sentence imposed upon his plea of guilty. By Opinion filed January 9, 1989, after hearing reargument, the court of appeals (per Stapleton, J.) affirmed petitioner's and Levy's convictions (and Levy's sentences). United States v. Levy, 865 F.2d 551 (3d Cir. 1989) (en banc); App. B. However, the appellate court vacated petitioner's and Yehuda's sentences and remanded for

---

2. The other co-defendant, Ellus Yehuda, pleaded guilty on the day of trial to Count 3 of the indictment. His sentence was vacated on direct appeal for the same reason as was this petitioner's. On remand, however, the district court permitted Yehuda to withdraw his guilty plea. He was convicted in the ensuing separate trial.

resentencing for the reason that the district court had imposed 20 year terms against both defendants on Count 3 apparently believing, on the basis of a statement of the prosecutor, that the terms carried parole eligibility after 10 years. Id. at 559-61.[3]

In connection with petitioner's resentencing on remand, counsel argued that the court should not impose Special Parole Terms on the two substantive counts of which petitioner was convicted, because the Special Parole provisions of 21 U.S.C. § 841(b)(1)(A) were repealed by Chapter V of the Comprehensive Crime Control Act of 1984 (effective Oct. 12, 1984). Referencing United States v. Munoz-Flores, 863 F.2d 654 (9th Cir. 1988) (cert. later granted), counsel further argued that the court should not impose special assessments on any of the counts, because the statutory provision authorizing such assessments, 18 U.S.C. § 3013(a)(2)(A), is unconstitutional under the Origination Clause.

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3. As amended in 1986, 21 U.S.C. § 841(b)(1)(A)(i) set a mandatory minimum sentence of ten years in prison for Count 3 in this case (and a maximum of life), because that count involved possession of at least one kilogram of heroin with intent to distribute. Section 841(b)(1)(B)(i) required a mandatory minimum of five years on Count 2, because it involved distribution of less than a kilogram but at least 100 grams of heroin; on each of these counts, probation and suspension of sentence are forbidden. In addition, parole is not allowed at any time on those two of the three counts on which Mr. Gozlon was convicted. Id. At the time of the offenses in this case, the drug conspiracy statute, 21 U.S.C. § 846, did not incorporate the mandatory minimums or nonparolability provisions of the substantive charges. (This discrepancy was eliminated as of November 18, 1988. Pub.L. 100-690, Title VI, § 6470(a), 102 Stat. 4377.)

Resentencing before Chief Judge Gerry was held on April 14, 1989. The court imposed a special assessment of $50 on each count, and Special Parole Terms of five years each on the two substantive counts, noting that he was aware of defense counsel's arguments, but not otherwise addressing them. The court imposed 15 years' imprisonment on the parole-ineligible Counts 2 and 3 for possession and distribution, and 20 years (parolable) for conspiracy on Count 1, all concurrent, as well as a (noncommitted) fine of $200,000 on Count 3. Id.

Petitioner appealed to the U.S. Court of Appeals for the Third Circuit. That court (per Becker, J., with Cowen & Seitz, JJ.) summarily rejected the challenge to the Special Assessments on the basis of it own prior decision in United States v. Simpson, 885 F.2d 36 (3d Cir. 1989). It gave plenary consideration to the challenge to the Special Parole Terms, however. The panel held that the lower court had erred in imposing Special Parole Terms, but ruled that a remand for the imposition of terms of Supervised Release was required, noting that in this regard its judgment accorded with that of the Ninth Circuit but diverged from that of the Fourth, Fifth and Eleventh. United States v. Gozlon-Peretz, 894 F.2d 1402, 1404 (3d Cir. 1990); App. A. The court further suggested that "the Supreme Court might wish to consider resolving the circuit conflict." Id. at 1406.

The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed within ten days of the entry of the initial judgment of sentence, in one

case, and within ten days of the imposition of sentence on remand for resentencing, in the other. Fed.R.App.P. 4(b). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses.

b. Statement of Facts

The underlying facts developed at petitioner's trial are set forth in unusual detail in the Third Circuit's in banc Opinion on the direct appeal. Appendix B, 865 F.2d at 553-56. These facts show that the case against petitioner Gozlon depended entirely upon the jury's acceptance for their truth of statements attributed to his severed co-defendant, Ellus Yehuda, who did not testify at trial. For present purposes, the facts may be summarized as follows.

After several months of abortive discussions, Yehuda called a DEA agent, acting undercover, to arrange a sale and delivery of heroin. They met in Newark, New Jersey, where Yehuda said he had "a friend" who had entered the United States from Thailand with about five kilograms of heroin; he provided the agent with a small sample and quoted an approximate price. Yehuda then used a pay phone to call a beeper number and soon received a call back, during which he conversed in a foreign language that the agent could hear but could not understand. That beeper was later found in petitioner and codefendant Levy's hotel room upon their arrest, and it was ascertained that the return call to the pay phone was made from a hotel room they were then sharing in New York.

Upon completing the conversation, Yehuda told the agent the terms to which his "friend" would agree. They arranged for a kilogram sale to take place in Atlantic City.

The next day, petitioner, Levy and Yehuda travelled together by bus from New York to Atlantic City. Levy took a tenth floor room at the Sands Hotel, using the false name on her Israeli passport. Ten minutes later, Yehuda met the agent at the Golden Nugget, a different hotel, where the agent had a room. Yehuda borrowed the agent's electronic scale and returned to the Sands to obtain the first half of the delivery, taking a taxi by a circuitous route. He employed further evasive techniques before taking an elevator to either the fifth or tenth floor. Yehuda returned to the Golden Nugget after an hour and a half, still carrying the scale in a bag, and said his "friend" insisted on Yehuda's seeing the money first, which had not been part of the agreement. He described himself as "caught in the middle." The agent refused to "front" any money, but suggested Yehuda call his "friend" to try to work something out.

Yehuda used a pay phone in the hotel lobby, speaking again in a foreign language the agent did not understand. Yehuda then reported that he might be able to bring 100 grams, at which point the agent would show the money. The agent agreed, but Yehuda then said he had to await another call, as he had not spoken directly to the "friend" but rather to his girlfriend. A call soon came in to the pay phone, and Yehuda again spoke for a few minutes in a foreign language. He told the agent his friend insisted on Yehuda's seeing the money first. The agent made a

counter-offer and asked Yehuda to call his friend again, which Yehuda did, still without reaching an agreement. Investigation showed that each of these calls was to or from the room Levy had taken.

An hour later, near 11 p.m., Yehuda rented a room on the fourteenth floor of the Sands. A few minutes later, the agent received a beeper message to call a number which turned out to be a pay phone in the Sands lobby. He called and spoke with Yehuda, who said his "friend" had relented; they agreed on an initial delivery of 250 grams. At 11:45, Yehuda made the initial delivery and was arrested. Agents then searched the two rooms. Petitioner was arrested in Levy's room, along with his false passport, beeper, bus ticket stub and New York hotel receipt. Upon arrest, petitioner identified himself as shown in the passport. Over two kilograms of heroin were found in Yehuda's room, along with the bag he had been carrying.

REASONS FOR GRANTING THE WRIT

1. The decision below perpetuates a circuit conflict on the question whether supervised release can be imposed for controlled substance offenses committed between October 27, 1986, and November 1, 1987.

At petitioner Moshe Gozlon-Peretz's resentencing on April 14, 1989, the district court imposed Special Parole Terms of five years on Counts 2 and 3 of the indictment, the two substantive counts. The court of appeals ruled that supervised release was required instead. The question of which, if either, form of post-confinement monitoring is applicable to various levels of

federal drug offenses committed during various time periods has vexed the lower federal courts during the past four years.

The Count 2 conviction in this case was for distributing 240 grams of heroin, and the conviction on Count 3 was for possessing with intent to distribute in excess of one kilogram of heroin, both in violation of 21 U.S.C. § 841(a)(1). The date of the offenses was February 26, 1987. Because the provision authorizing Special Parole Terms for those offenses had been repealed before that date, the court of appeals agreed with the petitioner that the Special Parole Terms imposed by the district court are invalid and must be vacated. The court of appeals ruled, however, based on the language of § 841(b)(1) as amended in 1986, that terms of supervised release were required on those counts and remanded for their imposition. This Court should grant certiorari to review that judgment, which accords with the view of two other circuits but conflicts with the approach of six others.

The Third Circuit's decision below, reading the 1986 Anti-Drug Abuse Act amendments to § 841(b) to have established immediately-effective provisions for terms of supervised release, accords with the decisions in cases under 21 U.S.C. § 841(b)(1)(A) rendered by the Ninth Circuit in United States v. Torres, 880 F.2d 113 (1989), cert. denied, 110 S.Ct. 873, 107 L.Ed.2d 956 (1990), and the First Circuit in United States v. Figueroa, 1990 WestLaw 29309 (filed March 21, 1990).[4]

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4. But see United States v. Ferryman, to be pub. at 897 F.2d 588 (1st Cir., Feb. 21, 1990) (supervised release not applicable to Sept. 1987 case involving 9 ounces [about 250 grams] of cocaine; Special Parole Term does apply because would have come

The decision below directly conflicts, however, with a decision of the Tenth Circuit which holds that the supervised release language of § 841(b)(1)(A), as amended in 1986, was not effective for offenses committed prior to November 1, 1987. See United States v. Levario, 877 F.2d 1483, 1487-89 (1989), which accords with and endorses the reasoning applied in § 841(b)-(1)(B) cases by the Second, Fourth, Fifth, Eighth and Eleventh Circuits in United States v. Mercado, 1990 WestLaw 25091 (2d Cir., filed Jan. 10, 1990, pub. March 5, 1990) (per curiam);[5] United States v. Portillo, 863 F.2d 25 (8th Cir. 1988) (per curiam); United States v. Whitehead, 849 F.2d 849, 860 (4th Cir.), cert. denied, 109 S.Ct. 154 (1988); United States v. De Los Reyes, 842 F.2d 755, 757, 758 n.3 (5th Cir. 1988) (declining to resolve precise question presented in this case);[6] and United States v. Smith, 840 F.2d 886, 889-90 (11th Cir.), cert. denied, 109 S.Ct. 154 (1988). As suggested in the opinion below, App. A., 894 F.2d at 1405-06, this Court should grant certiorari to resolve this substantial split, which creates significant and

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under 1984 version of § 841(b)(1)(B)).

5. See also Cedeno v. United States, 1990 WestLaw 44192 (filed April 13, 1990) (per curiam); cf. United States v. Ransom, 866 F.2d 574, 575, 576 (2d Cir. 1989) (per curiam) (agreeing, albeit in non-drug case, that Supervised Release cannot be imposed as part of sentence for offense committed before November 1, 1987).

6. See also United States v. Robles-Pantoja, 887 F.2d 1250, 1258-61 (5th Cir. 1989); United States v. Posner, 865 F.2d 654, 660 (5th Cir. 1989); United States v. Byrd, 837 F.2d 179, 181-82 (5th Cir. 1988).

persistent problems in the administration of federal criminal postconviction justice.

Between its enactment in 1970 and its amendment on October 12, 1984, 21 U.S.C. § 841(b)(1)(A) provided for a Special Parole Term of at least three years as part of the penalty for the class of offenses of which petitioner was convicted in Counts 2 and 3. Effective October 12, 1984, however, Congress created a new § 841(b)(1)(A) for higher volume cases like petitioner's, which, inter alia, deleted the Special Parole provision. Comprehensive Crime Control Act of 1984, Pub.L. 98-473, ch. V (Controlled Substances Penalties Amendments Act of 1984), § 502(1), 98 Stat. 2068.[7] Therefore, "after October 12, 1984, special parole terms ... were not authorized for sentences under § 841(b)(1)(A)." United States v. De Los Reyes, 842 F.2d 755, 757 (5th Cir. 1988).

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7. The Controlled Substances Penalties Amendments Act is Part A of Chapter V of the Comprehensive Crime Control Act of 1984. New § 841(b)(1)(A) provided the penalties for violations of § 841(a)(1) involving, inter alia, "100 grams or more of a controlled substance in schedule I ... which is a ... substance containing a detectable amount of [certain narcotic drugs, including heroin]." Thus, Mr. Gozlon's Count 2 and 3 offenses, both of which involved over 100 grams of a substance containing heroin, would have been subject to § 841(b)(1)(A) as amended by the 1984 Controlled Substances Penalties Amendments Act. The chapter containing the Act did not contain an express effective date provision, and therefore became effective immediately upon being signed into law, on October 12, 1984.

Chapter II of the 1984 Act, the Sentencing Reform Act, also contained an amendment deleting the Special Parole Term from § 841(b)(1). Sentencing Reform Act of 1984, Pub.L. 98-473, § 224(a), 98 Stat. 1987, 2030. This provision initially stated that it would become effective on November 1, 1986, but Congress later delayed the effective date of the entire Sentencing Reform Act until November 1, 1987. See Mistretta v. United States, 488 U.S. 361 (1989).

On October 27, 1986, Congress again amended § 841(b) by enacting revised subsections 841(b)(1)(A), 841(b)(1)(B) and 841(b)(1)(C). These amendments, in pertinent part, established mandatory minimum penalties for violation of § 841(a)(1) involving specified higher quantities of certain substances, and substantially increased the maximum penalties for such offenses, distinguishing, for purposes of the sentencing range provided, between heroin offenses involving one kilogram or more (1986 § 841(b)(1)(A)) and those involving 100 grams or more (1986 § 841(b)(1)(B)).[8] The language of these amendments also provided for terms of supervised release for offenses under both of those subsections. Anti-Drug Abuse Act of 1986, Title I, Subtitle A (Narcotics Penalties and Enforcement Act of 1986), Pub.L. 99-570, § 1002(2), 100 Stat. 3207-2 to -3. (See text of Statutes Involved, above.) It is under that revision that petitioner was sentenced, based on the February 1987 date of the offenses for which he was convicted.

The question on which the circuits are divided is whether the supervised release provisions of the 1986 Narcotics Penalties and Enforcement Act became effective on October 27, 1986, along with the rest of that revision of § 841(b)(1), or whether they did not go into effect until November 1, 1987, which is the date on which parole was abolished and terms of supervised release first became applicable to other federal

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8. The same amendment also changed the sentencing categories for cocaine cases. The analogous cut-off points for cocaine were 5 kilos or more (1986 subsection (b)(1)(A)) and 500 grams or more (1986 subsection (b)(1)(B)).

offenses. November 1, 1987, is also the effective date of 18 U.S.C. § 3583, which defines the novel sentencing concept of supervised release and provides standards for its imposition. See Pub.L. 99-570, Title I, § 1004(b) (effective date of provisions substituting supervised release for special parole).

As the court below recognized, App. A, 894 F.2d at 1403, there no longer seems to be any dispute that an offense committed on or after October 12, 1984, and punishable (in light of the particular quantity of the particular substance involved) under 21 U.S.C. § 841(b)(1)(A) is not subject to any Special Parole Term.[9] For whatever reason, the authority for imposition of such terms was deleted from the Act by virtue of the 1984 amendments, effective immediately. See also United States v. Levario, 877 F.2d 1483, 1487 & n.6 (10th Cir. 1989).[10]

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9. The government did not concede this below. Instead, it claimed that the special parole provision was reinstated into § 841(b)(1)(A) for offenses committed between October 27, 1986, and November 1, 1987, by § 1005(a)(2) of the Anti-Drug Abuse Act of 1986. Section 1005(a)(2) of the 1986 Act amended subsection (a) of section 224 of the Comprehensive Crime Control Act of 1984 by striking paragraph (1) of that subsection. See Statutes Involved. Paragraph (1) had deleted the last sentence of § 841(b)(1)(A), as it existed before 1984, which had provided for a Special Parole Term. Section 224(a), however, did not even become effective until November 1, 1987, the same effective date as provided in the superseding supervised release provisions of § 1004 of the 1986 Act. The statute by which Congress had deleted the Special Parole provision from § 841(b)(1)(A), effective October 12, 1984, was § 502(1) of chapter V of the Comprehensive Crime Control Act of 1984. Therefore, the sole effect of § 1005(a)(2), and very possibly Congress's purpose in drafting it, was to eliminate a redundancy. The court below was therefore correct not even to discuss this erroneous contention.

10. There is a considerable number of well-reasoned cases that confirm the invalidity of the Special Parole Terms imposed in this case. E.g., United States v. Ward, 696 F.Supp. 247, 248 (W.D.Tex. 1988); United States v. Sanchez, 687 F.Supp. 1254, 1257 n.7 (N.D.Ill. 1988); United States v. Phungphiphadhana, 640 F.Supp. 88 (D.Nev. 1986).

Petitioner Gozlon was sentenced pursuant to § 841(b)(1)(A) on Count 3 for possession of approximately one kilogram of heroin, and under § 841(b)(1)(B) on Count 2 for distribution of 240 grams of heroin. The date of his offenses -- February 26, 1987 -- was after the statutory language authorizing (indeed, requiring) a Special Parole Term for those offenses had been repealed (October 12, 1984)[11] and before the effective date of the supervised release provisions (November 1, 1987). Thus, the Special Parole Terms imposed by the district court in this case were properly held on appeal in this case to be without statutory authorization and invalid.

The decision of the court below ordering the replacement of the erroneously imposed Special Parole Terms with terms of supervised release is faulty on several grounds. Most important, it conflicts with this Court's decision in Bifulco v. United States, 447 U.S. 381 (1980), which demonstrates the

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11. Under the law as it existed after October 12, 1984, there was no provision for Special Parole in any heroin case involving possession or distribution of more than 100 grams. But see United States v. McDaniel, 844 F.2d 535, 536 (8th Cir. 1988) (affirming denial of Rule 35(a) motion, holding Special Parole Term properly applied since quantity of drugs was less than one kilogram and therefore subject to sentence under § 841(b)(1)(B), rather than § 841(b)(1)(A), as amended by Controlled Substances Penalties Amendments Act; overlooking fact that offense involving 100 grams or more of heroin, as opposed to cocaine, would come within "new" 841(b)(1)(A)); United States v. Santamaria, 788 F.2d 824, 829 (1st Cir. 1986) (vacating, after government's concession of its invalidity, special parole term imposed under § 841(b)(1)(A), as amended in 1984, for possessing with intent to distribute one kilogram or more of mixture containing cocaine, on appeal from denial of Fed.R.Crim.P. 35(a) motion; also ignoring that 100 grams or more of heroin would come within amended subsection (A)).

correct methodology for resolving questions of statutory interpretation regarding whether a certain form of post-release monitoring applies, but which the court below does not even cite. In Bifulco, applying the rule of lenity, the Court held that no Special Parole Term could be applied for drug conspiracy convictions under 21 U.S.C. § 846 because the statute mentioned only imprisonment, fines, or both.[12] Second, the court of appeals unduly minimized the significant differences between the two forms of post-release supervision. And third, it disregarded the anomalous implication of its decision that Congress would have mandated the imposition of a novel form of sentence that was as yet completely undefined and for which the standards for controlling discretion had not yet gone into effect.[13]

The decision below is based, in part, on the assumption that the omission of Special Parole Terms as to "high volume drug offenses" in the 1984 Act was an "error," and that "it is not reasonable to believe that Congress intended to correct a previous error by making the correction effective two years hence." App. A, 894 F.2d at 1405. Nothing in the legislative

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12. The result in Bifulco was eventually overriden by Congress, for offenses committed on or after November 18, 1988. Pub.L. 100-690, Title VI, § 6470(a), 102 Stat. 4377.

13. There is no problem here of any possible ex post facto violation. Mr. Gozlon's resentencing post-dated the effective date of the supervised release provisions, November 1, 1987, but his offenses were committed in February 1987. There has been no dispute in this case that under Art. I, § 9, cl. 3, of the United States Constitution, he cannot receive any "punishment more severe than the punishment assigned by law when the act to be punished occurred." Weaver v. Graham, 450 U.S. 24, 30 (1981). See also Miller v. Florida, 482 U.S. 423 (1987).

history of the 1986 amendments suggests that Congress viewed its 1984 action as having been in error, or that it intended to "correct" it. The presumption, of course, must be the opposite: that Congress intends to do what it did and that it need not state or explain its policy reasons for enacting laws. Nor, under Bilfulco, may a court assume that Congress cannot have intended the more lenient of two results, even in the context of anti-drug abuse legislation. Instead, several plausible explanations for the less harsh interpretation come to mind.

Congress might have thought that prisoners completing longer sentences would already be subject to longer periods of mandatory release supervision under 18 U.S.C. § 4164, making Special Parole redundant; or that such ex-offenders would be incorrigible, making it pointless; or that after serving longer terms this class of violators would be mellowed with age or more likely rehabilitated. Congress could make any of these judgments -- or any number of others -- without any requirement that they be expressed in legislative history, and without courts' being entitled to presume that a criminal sentencing provision must be given the more onerous of two interpretations.

Indeed, as revealed in the careful examination of the legislative history by the First Circuit in United States v. Ferryman, 897 F.2d 588 (1990), it is at least as likely that the use of the expression "supervised release" in those parts of the 1986 amendments which were to be immediately effective was itself the result of careless drafting rather than of thoughtful policymaking. It is no more illogical (or logical) to delay the

effective date of supervised release for more-than-100-gram heroin cases until a regime for its implementation and enforcement exists than to omit Special Parole for all drug conspiracy and attempt cases, as this Court found and enforced in Bifulco.

Special Parole Terms and terms of supervised release are not so readily interchangeable as suggested by the court below. The minimum length of any term of supervised release is longer than the comparable minimum Special Parole Term. If supervised release is revoked, there is no provision in the law for rerelease, and since the maximum term of supervision is in every case potentially unlimited, incarceration may in any case then be for life.[14] Moreover, the discussion by counsel for the Administrative Office, quoted with approval by the court below, App. A, 894 F.2d at 1404-05, emphasizing the more selective quality of supervised release as compared with the former parole system, is inapplicable to the controlled substance offenses under consideration here. In cases such as this, not only are all sentences nonparolable even under "old law," but supervised release is also made mandatory, not discretionary, and thus must be imposed even where, in the opinion of the sentencing judge, post-release supervision would serve no purpose in the particular case.

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14. On the other hand, if the term is not for life, a Special Parole Term, once revoked, may result in longer incarceration than a revoked term of supervised release. This is because when Special Parole is revoked, the total SPT is added to the unserved portion of the underlying term of imprisonment and the prisoner than may then face up to the total unserved balance, 21 U.S.C. § 841(c), whereas when supervised release is revoked, only that term is served. 18 U.S.C. § 3583(e)(3).

Under the regime envisioned by the court below, a sentencing judge is bound to impose a term of supervised release in imposing sentence for an offense committed between October 1986 and November 1987 despite the absence of any applicable definition of that term or standards for exercising the wide discretion allowed for selecting the term's duration. That is because 18 U.S.C. § 3583, which contains such provisions, was part of the Sentencing Reform Act and unambiguously did not go into effect until November 1, 1987, and by law does not apply to any offense committed before that date. Sentencing Act of 1987, Pub.L. 100-182, § 2(a), 101 Stat. 1266. As the Fifth Circuit put it in the leading case on this problem, what is more orderly and logical is "tying the effective date of the change to the effective date of the implementing statute." United States v. Byrd, 837 F.2d 179, 181 n.8 (5th Cir. 1988).

For all these reasons, this Court should grant this petition for certiorari and reverse the judgment of the United States Court of Appeals for the Third Circuit to the extent that it remanded petitioner Gozlon's case for imposition of terms of supervised release.

2. The Court should grant certiorari to make clear that its 1917 opinion in Hitchman Coal, holding that a statement is admissible as a coconspirator's admission even if made in furtherance of some joint enterprise other than a shared criminal objective, is no longer good law under Fed.R.Evid. 801(d)(2)(E), and to resolve the conflict in the circuits on this question.

For one person's statement to become another's vicarious admission under Fed.R.Evid. 801(d)(2)(E), the declarant and the

defendant must be coconspirators and the statements in question must have been made during and in furtherance of the conspiracy. In this case, petitioner Gozlon did not dispute on appeal that he had travelled with his severed codefendant Ellus Yehuda to Atlantic City and checked into a hotel with codefendant Yaffa Levy in Yehuda's presence. Nor did he dispute that it was he or Levy with whom Yehuda spoke by telephone on several occasions while Yehuda attempted to negotiate a heroin deal with the undercover agent. These conversations, however, were all held in a foreign language that the agent did not understand. The only evidence of what was said by petitioner in these conversations -- or even that they concerned the drug transaction -- consisted of Yehuda's statements, as recounted by the agent at trial. Petitioner thus denied that the evidence (other than the statements themselves) showed any participation on his part in Yehuda's scheme to sell heroin, rather than their joint participation in some other activity, coupled with Yehuda's pretending, simply to gain a negotiating advantage, that he was calling his source, who insisted on better terms than the agent was offering.

The courts of appeals are divided on the question of what it means to be "a coconspirator" in "the conspiracy" within the meaning of Rule 801(d)(2)(E). In Gov't of Virgin Is. v. Brathwaite, 782 F.2d 399, 403 & n.1 (3d Cir. 1986), the Third Circuit held that the independent evidence need show only a joint undertaking, and not shared criminality.[15] That is the dominant

15. On other occasions, the court below has seemed to follow a different rule. See, e.g., United States v. Inadi, 748 F.2d

view among the circuits. See United States v. Layton, 855 F.2d 1388, 1397-1400 (9th Cir. 1988), cert. denied, 103 L.Ed.2d 244 (Feb. 21, 1989) (agreeing with Third Circuit and collecting cases from several others). On the other hand, the Second Circuit has firmly ruled that the conspiracy referred to must be the charged conspiracy, or at least a criminal conspiracy. Id. at 1400 (listing 2d Cir. cases); see also United States v. Cambindo Valencia, 609 F.2d 603, 635-36 n.25 (2d Cir. 1979) (requiring statements to have been made in furtherance of the charged conspiracy, for reasons of efficient judicial administration of the trial).

Long prior to the enactment of the Federal Rules of Evidence, this Court had discussed this question and arguably opted for the broader view.

> In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. ... [W]hen any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them.

812, 817 (3d Cir. 1984), rev'd on other grds., 475 U.S. 387 (1986); United States v. Gibbs, 739 F.2d 838, 844 & n.16 (3d Cir. 1984) (en banc), cert. denied, 469 U.S. 1106 (1985); United States v. Ammar, 714 F.2d 238, 250 (3d Cir.), cert. denied, 464 U.S. 936 (1983) ("complicity in the criminal enterprise").

Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917); but cf. Anderson v. United States, 417 U.S. 211, 218 (1974) ("The hearsay-conspiracy exception applies only to declarations made while the conspiracy charged was still in progress, a limitation that this Court has 'scrupulously observed.'" [emphasis added]).

The Federal Rules, however, separated out the rule on coconspirators' declarations from all other statements of agents and imposed separate and more limited conditions on the former's admissibility. Rule 801(d)(2) provides, in pertinent part:

> A statement is not hearsay if -- ... (2) **Admission of party opponent.** The statement is offered against a party and is ... (D) a statement by the party's agent ... concerning a matter within the scope of the agency ..., made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

If coconspirator declarations were just another kind of agency admissions, the Rule would need no separate subsection (E) with its special limitations. Under subsection (E) of this rule, the defendant and the declarant must be shown to have been "coconspirator[s]" in a joint undertaking which can be described as "the conspiracy."

The language of the Rule does not require that a conspiracy count have been charged (although here it was), but it does necessarily require that a particular conspiracy be identified as that to which the proposed vicarious admissions may be related. "Coconspirator" is a legal term of art. Section 371 of Title 18, for example, criminalizes conspiracy to commit a federal offense by using the term "conspires" without definition or explanation.

The drafters of the Federal Rules cannot be presumed to have used such a term loosely. Two persons are not "coconspirators" unless they share a common criminal objective, known to and agreed to by both of them. United States v. Wexler, 838 F.2d 88 (3d Cir. 1987); United States v. Rosenblatt, 554 F.2d 36 (2d Cir. 1977). To allow statements to come into evidence on the basis of a mere "joint undertaking" is to disregard completely the language of the Rule.

The "joint enterprise" theory of Rule 801(d)(2)(E) also renders its "scope" and "furtherance" limitations impossible to enforce. If the defendant and the declarant need only be engaged in some "enterprise" or "undertaking" together, it would not be possible to ascertain whether the statements were made "during the course" of "the conspiracy" and "in furtherance of" it, as the Rule demands. Unless the conspiracy has a specific objective, it is not possible to say whether the statement tends to achieve that objective ("in furtherance"), nor to say whether that objective has been reached yet ("during the course").

In this case, petitioner Gozlon travelled with Levy and Yehuda from New York to Atlantic City, and they checked into hotel rooms together. Obviously, there was some sort of "common undertaking," legal or otherwise. But neither under the independent evidence test nor even under the regime of United States v. Bourjaily, 483 U.S. 171 (1987),[16] did the evidence preponderate toward

16. Petitioner argued below that under due process principles, analogous to the way in which the Ex Post Facto clause operates with respect to new statutory rules of evidence, Bourjaily could not be applied on appeal to this pre-Bourjaily trial. If this Court grants the writ and reaches this question, petitioner would seek to preserve that position.

making petitioner or Levy a "coconspirator" with Yehuda. Thus, under a proper application of Rule 801(d)(2)(E), the Yehuda statements should not have been admitted as evidence against the petitioner.

For this reason as well, this Court should grant the writ of certiorari and reverse the judgments of conviction, granting petitioner a new trial.

3. The Circuits are in conflict on the question whether the Special Assessment statute is invalid under the Origination Clause; this case presents the same question that this Court currently has under consideration in the Munoz-Flores case.

This Court granted certiorari in United States v. Munoz-Flores, 863 F.2d 654 (9th Cir. 1988), cert. granted, 110 S.Ct. 48, 107 L.Ed.2d 17 (Oct. 2, 1989) (No. 88-1932), to resolve the conflict in the Circuits on the question whether the Special Assessment law, 18 U.S.C. § 3013, was enacted in violation of the Origination Clause of the U.S. Constitution. Munoz-Flores is now pending decision after argument. This case presents the same question, see App. A, 894 F.2d at 1403 n.1 (dismissing the point on the basis of circuit precedent), and with regard to that issue should be resolved in accordance with the opinion in Munoz-Flores.

CONCLUSION

For each of the foregoing reasons, petitioner MOSHE GOZLON-PERETZ prays that this Court grant his petition for a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Third Circuit affirming his conviction and remanding the sentence for imposition of terms of supervised release.

Respectfully submitted,

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Attorneys for Petitioner

April 25, 1990.

UNITED STATES of America

v.

Moshe GOZLON-PERETZ, Appellant.

No. 89-5330.

United States Court of Appeals, Third Circuit.

Submitted Under Third Circuit Rule 12(6) Oct. 16, 1989.

Decided Jan. 25, 1990.

As Amended Feb. 6, 1990.

Defendant was convicted of distribution of heroin. On appeal, the Court of Appeals, 865 F.2d 551, vacated sentence and remanded for resentencing. On remand, the United States District Court for the District of New Jersey, John F. Gerry, Chief Judge, sentenced defendant to five years special parole term. On appeal, the Court of Appeals, Becker, Circuit Judge, held that section of Anti-Drug Abuse Act of 1986 mandating supervised release terms became effective on date of its enactment and not on later effective date of Sentencing Guidelines.

Affirmed in part and vacated and remanded in part.

Criminal Law ⇐982.2

Section of Anti-Drug Abuse Act of 1986 mandating term of supervised release became effective on date of its enactment, not on later effective date of Sentencing Guidelines. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A), as amended, 21 U.S.C.A. § 841(b)(1)(A).

Pamela A. Wilk, Philadelphia, Pa., for appellant.

Samuel A. Alito, Jr., U.S. Atty., Michael V. Gilberti, Asst. U.S. Atty., Edna Ball Axelrod, Chief Appeals Div., U.S. Atty's. Office, Newark, N.J., for appellee.

Before BECKER, COWEN and SEITZ, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

This appeal by Moshe Gozlon-Peretz challenges the imposition of a five-year term of special parole, as part of a sentence for a drug conviction, on the ground that in February 1987, when the offense was committed, it was not punishable by a special parole term. During the 1970's and 1980's, special parole became a staple of the penalty scheme prescribed by Congress for drug offenses. However, in amending 21 U.S.C. § 841(b) pursuant to the enactment of the Comprehensive Crime Control Act of 1984, Congress failed to provide for special parole in § 841(b)(1)(A), which defines the high volume drug crime for which appellant was convicted and sentenced.

Appellant acknowledges that in the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570 Tit. I (1986) ("the ADAA"), which amended the 1984 Act, Congress created an alternative to special parole—the so-called term of supervised release. However, appellant contends that Congress intended supervised release to be complementary to the Sentencing Reform Act's new guidelines sentencing regime, which did not become effective until November 1, 1987. Because the offense in question occurred in February 1987, appellant submits that he is not subject to a term of supervised release either.

The government responds that Congress intended the 1986 legislation, which was enacted on October 27, 1986 and had no effective date provisions, to become effective immediately. Such a reading, the government maintains, requires the imposition of special parole, not supervised release, in this case. We do not agree with the government's contention that an immediate effective date would resuscitate the moribund special parole sentencing option, but we do believe that Congress intended the supervised release provisions to become effective immediately. Accordingly, we will vacate the judgment of sentence, and remand to the district court with directions to vacate the sentence of special parole and

App. A

to impose a term of supervised release.[1]

I.

A.

The background facts are set forth in our opinion in *United States v. Levy*, 865 F.2d 551 (3d Cir.1989) (in banc). There, we vacated Gozlon-Peretz's sentence and remanded for resentencing. On remand, the district court imposed large fines and lengthy prison terms followed by a five-year special parole term, pursuant to 21 U.S.C. § 841(b)(1)(A).

Before 1984, certain sentences imposed under the applicable sentencing provision in this case, 21 U.S.C. § 841(b), were required to include a special parole term. *See* 21 U.S.C. § 841(b) (1982). On October 12, 1984, Congress enacted the Comprehensive Crime Control Act, Pub.L. No. 98-473, 98 Stat. 1837, 1976 (1984) ("the Act"), which amended existing federal drug law.[2] Among these amendments, the Act created three levels of offenses based upon the weight of the drugs in question. Specifically, Congress amended § 841(b) by:

(1) eliminating special parole for offenses committed after the effective date of the Act (originally November 1, 1986, and later changed to November 1, 1987);

(2) redesignating old §§ 841(b)(1)(A) and (B) as new §§ 841(b)(1)(B) and (C), respectively; and

(3) creating a new class of sentences under "new" § 841(b)(1)(A), which provided for higher sentences for greater weights of drugs.

98 Stat. at 2030, 2068. *See also United States v. De Los Reyes*, 842 F.2d 755, 757 (5th Cir.1988). Apparently through oversight, new § 841(b)(1)(A) did not mention a special parole term. Acknowledging that oversight, neither party here contends that special parole or supervised release can be imposed for crimes committed between October 12, 1984 and October 27, 1986, the date of the ADAA's enactment. *See United States v. Phungphiphadhana*, 640 F.Supp. 88 (D.Nev.1986); *United States v. Mowery*, 703 F.Supp. 940 (M.D.Ga.1989). Appellant maintains, however, that special parole cannot be imposed on any § 841(b)(1)(A) offense committed between October 12, 1984, and November 1, 1987, the effective date of the Sentencing Reform Act.

In § 1002 of the ADAA, Pub.L. No. 99-570, 100 Stat. 3207-2 to 3207-4 (1986), Congress again amended § 841(b) by:

(1) striking the existing §§ 841(b)(1)(A) and (B);

(2) reattaching and redesignating § 841(b)(1)(C) as § 841(b)(1)(D);

(3) adding three new subsections: new §§ 841(b)(1)(A), (B), and (C),

(4) attaching mandatory "supervised release" to new §§ 841(b)(1)(A), (B), and (C).

The amendments thus prescribed four offense levels instead of three, based upon the weight of the drugs. These enhanced prison terms and fines and the attendant terms of "supervised release" were made applicable to the first three parts of § 841(b), including § 841(b)(1)(A), the section under which appellant was sentenced. Section 1002 did not carry an express provision for its effective date.

In contrast, section 1004 of the ADAA, Pub.L. No. 99-570, 100 Stat. 3207, 3207-6 (1986), which deleted all remaining references to special parole terms and substituted for them the term "supervised release," specifically provided that it was to take effect at the same time as 18 U.S.C. § 3583, which was part of the Sentencing Reform Act, 18 U.S.C. § 3551 *et seq.* (Supp. IV 1986). Because of a legislative postponement, that Act, originally scheduled to go into effect on November 1, 1986, did not go into effect until November 1, 1987. *See* Pub.L. No. 99-217, § 4, 99 Stat. 1728 (1985).

1. The appellant's only other claim—that the district court's imposition of a special assessment of $50.00 on each count was invalid because 18 U.S.C. § 3013 was enacted in contravention of the origination clause, U.S. Const. art. I, § 7, cl. 1—has been foreclosed by our opinion in *United States v. Simpson*, 885 F.2d 36 (3d Cir.1989).

2. The Sentencing Reform Act was one chapter of the Comprehensive Crime Control Act. *See* 98 Stat. 1976, 1987.

B.

We find that under § 1002 of the ADAA, appellant is subject to a mandatory minimum five-year term of supervised release in addition to his term of imprisonment. That is the result reached on essentially identical facts in *United States v. Torres*, 880 F.2d 113 (9th Cir.1989), which held that the regime of supervised release under § 841(b)(1)(A) came into being on October 27, 1986, the date of enactment of the ADAA. A number of other cases hold that § 1002 did not go into effect (and supervised release for drug cases did not come into being) until November 1, 1987. *See United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir.1988); *United States v. Smith*, 840 F.2d 886, 889 (11th Cir.1988); *United States v. Byrd*, 837 F.2d 179, 181 (5th Cir. 1988). These cases are arguably explained by the fact that they all involved lower volume drug offense provisions, for which special parole was not abolished until November 1, 1987. *See* § 1004(b) of the ADAA, 100 Stat. at 3207-6. In each of these cases, the courts vacated terms of supervised release and directed that the district court impose terms of special parole instead, thus treating supervised release and special parole as somewhat interchangeable concepts. That course of action cannot be followed here because no special parole term is available for violations of § 841(b)(1)(A) occurring after October 12, 1984.

We do not dispute that special parole and supervised release are closely related mechanisms for post-release supervision of federal offenders.[3] However, the substitution of supervised release for special parole of federal offenders was not accidental:

> The legislative history of the [Sentencing Reform Act of 1984] shows that Congress was dissatisfied with the "old" law which conditioned the length of time a defendant was supervised on parole solely on the length of the original term; the smaller percentage of the term a prisoner served in prison, the longer the period of parole supervision. Congress decided to replace this system with one that would make both the existence and the length of post-incarceration supervision dependent on the judge's decision as to whether community supervision was needed in an individual case. The Senate Report in the section-by-section analysis explained this approach:
>
> > Unlike current law, however, probation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it.
>
> Slawsky, Looking at the Law, 53 Federal Probation 69, 70 (June 1989) (quoting S.Rep. No. 225, 98th Cong., 2d Sess 125, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3308). Thus, Congress had more than formal reasons for supplanting (special) parole with supervised release, and to the extent that the *Whitehead*, *Smith*, and *Byrd* courts found the two mechanisms to be substantively the same, we disagree with their holdings.

We hold that supervised release became effective on October 27, 1986. We acknowledge that supervised release was conceptually linked to the regime of the Sentencing Reform Act, which did not become effective until November 1, 1987, but we do not believe that supervised release terms are inseparable from the Sentencing Reform Act's regime. Two basic principles of statutory construction compel our holding. First, absent indication to the contrary, a statute takes effect on the date of its enactment. *See Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65 (3d Cir.1989); 2 Sutherland's Statutory Construction § 33.06 (4th ed. 1986). Second, courts must impute a reasonable purpose to Congress, and it is unreasonable to think that Congress want-

3. The bill originated in the Reagan Administration, not the Congress. As sent by the President to the Congress, *see* "The Drug Free America Act of 1986: A Proposal to Congress From the President of the United States," the bill spoke of special parole. *See* Proposal § 502(1)(A)(VIII). It was Congress that invented "supervised release."

ed to maintain special parole for all offenses committed up until November 1, 1987. A number of considerations support this view, as reasoned by Ms. Slawsky, Assistant General Counsel of the Administrative Office of the United States Courts:

> [G]iven the relatively long periods of incarceration required by these sections, by the time most of these defendants returned to the community, the supervised release provisions of the Sentencing Reform Act would be in effect, and . . . by the time some of the defendants served their long mandatory minimum terms of imprisonment, the Parole Commission would no longer be in operation to supervise special parole terms.

Slawsky, *supra*, at 86. Thus, supervised release will de facto replace special parole for offenses committed after November 1, 1987. Furthermore, supervised release will be administered by the federal probation service whereas special parole is administered by the United States Parole Commission, which will expire by operation of law in 1992. *See* section 235 of the Sentencing Reform Act, 98 Stat. at 2031-32, (stating that chapter 311 of Title 18 of the United States Code, 18 U.S.C. § 4201 *et seq.*, remains in effect until five years after the effective date of the Act). Although a successor agency will doubtless be created, its anatomy and powers are unknown.

Additionally, to the extent that Congress did inadvertently leave special parole out of the 1984 Act and intended to correct its error with respect to high volume drug offenses in the ADAA, it is not reasonable to believe that Congress intended to correct a previous error by making the correction effective two years hence. Thus, we hold that supervised release came into effect with the enactment of the ADAA, on October 27, 1986.[4]

We recognize that this holding perpetuates a circuit split. We join the Ninth Circuit in holding that supervised release became effective when the ADAA became effective. Although the Fourth, Fifth and Eleventh Circuits were not faced with situations where the defendant would be unsupervised (the defendants in those cases were charged with distributing smaller quantities of drugs so that special parole applied, *see supra* at 1404), the district courts in those circuits are bound by the *Whitehead*, *Smith*, and *Byrd* decisions "across the board." At first reading this point may seem technical, but its practical consequences are enormous because responsibility for supervising post-release offenders will be divided, for no logical reason, between the probation service, for people sentenced to supervised release, and the U.S. Parole Commission or its successor, for people sentenced to special parole.[5] The problem is compounded by the fact that supervision by the judiciary is frequently transferred from one district to another, *see* 18 U.S.C. § 3605, and the transferee district may be in a different circuit with a different rule as to whether special parole or supervised release is the proper sentence. The anatomy of the problem that may arise in the event that such a sentence is challenged in a proceeding under 28 U.S.C. § 2241 is described in the margin.[6] For these reasons the Supreme Court might wish to consider resolving the circuit conflict.

The judgment of sentence will be vacated and the case remanded with directions to impose a term of supervised release in lieu of a term of special parole. In all other respects, the judgment of sentence will be affirmed.

4. We do not find the explicit invocation of the later effective date (November 1, 1987) for "the amendments made by this section" in § 1004(b) of the ADAA, 100 Stat. at 3207-6, to be inconsistent with our holding. The "section" referred to in § 1004 means only § 1004 itself, not the entire ADAA, and the amendments referred to, contained in § 1004(a), strike out the term "special parole" and insert the term "supervised release." These amendments were necessary because, although § 1002 of the ADAA inserted supervised release for some offenses which had previously been special parole offenses (21 U.S.C. § 841(b)(1)(A), (B) & (C)), it did not insert supervised release for all special parole offenses. For instance, special parole was retained for 21 U.S.C. §§ 841(b)(1)(D), 845, 845a, 845b, and 960(b)(4). Thus, § 1004(b) was necessary to effectuate the change from special parole to supervised release for all those offenses for which the ADAA had not already implemented supervised release.

5. We note that a special parole term may require more community supervision because, upon revocation of a special parole, an individual may be re-paroled. By comparison, after revocation of a supervised release term, there is no provision for additional post-release supervision.

> We also note in this regard that the government's argument that special parole, not supervised release, is the appropriate post-release supervision mechanism to fill the void created by the legislative confusion, is undermined by the fact that Congress, in passing the ADAA, perpetuated special parole for some offenses, but not for others. It appears that Congress knew which offenses it wanted special parole to apply to in the interim period, and 21 U.S.C. § 841(b)(1)(A) was not one of them.

6. Assume a transferor district on a regime of supervised release and a transferee district on a regime of special parole. While many courts may find that the sentence as imposed is the sentence that controls, this situation will at the very least lead to increased litigation. In this situation, if the Court attempts to revoke supervised release, the defendant can claim that the Parole Commission has jurisdiction and that the Commission's reparole guidelines should apply. A defendant in such a situation could also claim that he is entitled to early termination of parole pursuant to 18 U.S.C. § 4211(c), a provision that has no parallel for supervised release. Such scenarios serve to underscore that, given the clear split in the circuits, similarly situated releasees will often be treated differently.

The UNITED STATES

v.

Philip Henry OLECK and David Bedell.

Appeal of David BEDELL.

No. 89-3461.

United States Court of Appeals, Third Circuit.

Submitted Oct. 10, 1989.

Decided Jan. 25, 1990.

Narcotics defendant appealed from decision of the United States District Court for the Western District of Pennsylvania, Glenn E. Mencer, J. The Court of Appeals, Becker, Circuit Judge, held that district court had authority to impose term of supervised release for offense committed after date of enactment of Anti-Drug Abuse Act of 1986 but before effective date of section of that Act substituting "supervised release" for all remaining "special parole" offenses.

Affirmed.

Criminal Law ⇐982.2

District court had authority to impose term of supervised release for offense committed after date of enactment of Anti-Drug Abuse Act of 1986 but before effective date of another section of Act substituting "supervised release" for all remaining "special parole" offenses. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), as amended, 21 U.S.C.A. § 841(b)(1).

David Bedell, Elgin, Fla., pro se.

Paul J. Brysh, Asst. U.S. Atty., Pittsburgh, Pa., for appellee.

Before BECKER, GREENBERG and VAN DUSEN, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

This appeal presents the same question as that posed in the companion case, *United States v. Gozlon-Peretz*, 894 F.2d 1402 i.e. whether the district court had authority to impose a term of supervised release for a sentence imposed pursuant to 21 U.S.C. § 841(b)(1) for an offense committed after October 27, 1986, the date of enactment of the Anti-Drug Abuse Act of 1986 (ADAA), but before November 1, 1987, the effective date of ADAA section 1004.[1] Appellant

1. Section 1002 of the ADAA replaced old §§ 841(b)(1)(A), (B) and (C) with new provisions that included supervised release terms, not special parole terms. 100 Stat. 3207-2 to 3207-4

UNITED STATES of America

v.

Yaffa LEVY, a/k/a "Annette Amar", Appellant in No. 87-5595,

UNITED STATES of America,

v.

Moshe GOZLON-PERETZ, a/k/a "Pasquale DiStefano", Appellant in No. 87-5596,

UNITED STATES of America,

v.

YEHUDA, Ellus, a/k/a "Holly Berthold" Appellant in No. 87-5613.

Nos. 87-5595, 87-5596 and 87-5613.

United States Court of Appeals, Third Circuit.

Argued June 15, 1988.

Nos. 87-5595 and 87-5596 Reargued En Banc ~~June 15~~ Nov. 7, 1988.

No. 87-5613 Submitted Pursuant to Third Circuit Rule 12(6) Nov. 7, 1988.

Decided Jan. 9, 1989.

Defendants were convicted of distribution of heroin before the United States District Court for the District of New Jersey, John F. Gerry, Chief Judge, and defendants appealed. The Court of Appeals, Stapleton, Circuit Judge, held that: (1) independent evidence existed sufficient to allow admission of one codefendant's statements as those of coconspirators against the others; (2) evidence of one defendant's possession of one passport in false name was admissible at trial; (3) one defendant's sentence was remanded; and (4) district court on remand should explain imposition of fine on indigent defendant.

Affirmed in part and vacated and remanded in part.

1. Criminal Law ⇐427(5)

Independent evidence existed sufficient to admit statements made by one narcotics defendant to undercover federal officer to be admissible as statement of coconspirators in trial of other codefendants; first codefendant's use of telephone and immediate change of bargaining position during negotiations afterwards, his prior inability to acquire heroin independently, tenor of negotiations demonstrating declarant defendant was broker not supplier, agent's evaluation that first codefendant was in fact caught in the middle by a supplier, and second and third codefendant's possession of beeper which first codefendant repeatedly dialed during negotiations was sufficient. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

2. Criminal Law ⇐351(5)

Evidence of defendant's possession of foreign passport issued in false name was admissible in narcotics trial; defendant's use of false name and passport in checking into hotel rooms used for heroin distribution, and use of that name upon arrest was relevant as to her consciousness of guilt. Fed.Rules Evid.Rules 403, 403 note, 404(b), 28 U.S.C.A.

3. Drugs and Narcotics ⇐123(3)

Evidence was sufficient to demonstrate that one codefendant had sufficient knowledge and intent to convict her of heroin distribution charges; codefendant's use of false names to rent hotel rooms used as command post, use of false name to mislead police after arrest, another codefendant's presence with her, and her participation in negotiations to allow drug sale was sufficient. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, as amended, 21 U.S.C.A. §§ 841(a)(1), 846.

4. Drugs and Narcotics ⇐123(3)

Evidence was sufficient to demonstrate that one codefendant had sufficient knowledge and intent to convict him of heroin distribution charges; defendant's presence with codefendant in command post used for distribution, use of false name, and statements by another coconspirator indicating he was supplier of heroin was sufficient. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, as amended, 21 U.S.C.A. §§ 841(a)(1), 846.

App. B

5. Criminal Law ⇐1181.5(8)

In light of probability that prosecuting attorney and sentencing judge had misconception about legal effect of defendant's conviction for heroin distribution counts at his sentencing, defendant's sentences were vacated and remanded for resentencing. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1)(A)(i), (b)(1)(B)(i), 406, as amended, 21 U.S.C.A. §§ 841(b)(1)(A)(i), (b)(1)(B)(i), 846; U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐1181.5(1)

Where sentences imposed on two of three counts are vacated and are all three arose from same criminal transaction, it was appropriate to vacate the third.

7. Criminal Law ⇐986(3)

It would be preferable practice for district court, on remand for resentencing of defendant who had already been determined to be indigent, to accompany imposition of $200,000 fine with explanation of its purpose.

Samuel A. Alito, Jr., U.S. Atty., Michael V. Gilberti (argued), Asst. U.S. Atty., Newark, N.J., for appellee.

Roger Bennet Adler (argued), Roger Bennet Adler, P.C., New York City, for appellant Yaffa Levy

Peter Goldberger, Pamela A. Wilk (argued), Alan Ellis, Law Offices of Alan Ellis, P.C., Philadelphia, Pa., for appellant Moshe Gozlon-Peretz.

Salvatore J. Avena, Avena, Friedman and Klamo, Camden, N.J., for appellant Ellus Yehuda.

Argued June 15, 1988

Before MANSMANN, SCIRICA, and COWEN, Circuit Judges.

Reargued En Banc ~~June 15~~ Nov. 7, 1988

Before SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

I.

Appellants Yaffa Levy and Moshe Gozlon-Peretz were convicted by a jury in the United States District Court for the District of New Jersey on three counts. Count One of the Superseding Indictment charged participation in a conspiracy to distribute more than a kilogram of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982). Count Two charged distribution of approximately 240 grams of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (1982). Count Three charged possession with intent to distribute in excess of one kilogram of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Prior to the trial, appellant Ellus Yehuda, a codefendant, pleaded guilty to possession with intent to distribute two kilograms of heroin.

At trial, the government relied primarily upon the testimony of Special Agent Paul Maloney, an undercover DEA agent, to convict defendants Levy and Gozlon-Peretz of, *inter alia*, conspiracy to distribute heroin on or about February 26, 1987. While Maloney was on the stand, the government elicited testimony concerning out of court statements made by Yehuda during the negotiations leading to the sale of the heroin to Maloney. The government tendered much of that testimony as probative of the truth of the assertions made by Yehuda. After Levy and Gozlon-Peretz objected to the admissibility of this evidence on hearsay grounds, the government urged that it was admissible under Federal Rule of Evidence 801(d)(2)(E) as statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy." The district court applied the then governing circuit precedent, *United States v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983), and admitted the tendered evidence. Its action was premised

on a finding pursuant to the *Ammar* standard that the record evidence, without reference to the purported co-conspirator statements, made it more likely than not that those statements were made in furtherance of a then existing conspiracy of which the defendants were members. Yehuda was available to testify at the trial but neither side chose to call him to the stand.

After the defendants were sentenced and while their appeals were pending before this court, the Supreme Court of the United States decided *United States v. Bourjaily*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). In that case, the Court disapproved the test articulated in *Ammar*, holding that a trial judge may consider all evidence, including the tendered out of court statements of the alleged co-conspirator, in deciding whether to admit the statements.

Several issues are raised in this appeal from the defendants' convictions: 1) whether there was sufficient independent evidence under this court's decision in *Ammar* to warrant the admission under Rule 801(d)(2)(E) of the out of court statements made by alleged co-conspirator Yehuda; 2) whether the false passports of the defendants and their use of false names were properly admitted into evidence; 3) whether, assuming the admissibility of the co-conspirator statements and the evidence regarding false identification, there was enough evidence to support Levy's and Gozlon–Peretz's convictions; 4) whether retroactive application of *Bourjaily* to this case would violate notions of fundamental fairness inherent in the Due Process Clause of the Fifth Amendment; 5) whether, assuming *Bourjaily* is to be applied retroactively, there was sufficient evidence to permit the admission of the co-conspirator statements; 6) whether there is an unacceptable risk that the sentences imposed on Gozlon–Peretz and Yehuda were influenced by a misunderstanding on the part of the sentencing judge regarding the parole provisions of the Anti–Drug Abuse Act of 1986, Pub.L. 99–570, §§ 1002, 1003, 100 Stat. 3207–2 (codified at 21 U.S.C. § 841(b)(1) (Supp. IV 1986)); and 7) whether the district court erred in failing to make factual findings regarding Yehuda's ability to pay the $200,000 fine imposed upon him.

In keeping with the preferred practice of avoiding unnecessary decisions of constitutional issues, we first address the issue of whether the district court properly applied the *Ammar* standard when it admitted Yehuda's out of court statements. Because we hold that there was enough independent evidence to warrant the admission of these statements under *Ammar*, we do not reach the issue of whether *Bourjaily* could be applied here without violating due process. We also hold that the false passports and use of false identities were admissible, and that there was sufficient evidence to support Levy's and Gozlon–Peretz's convictions. We will vacate the sentences of Gozlon–Peretz and Yehuda, however, and remand for resentencing.

II.

In March, 1986, a government informant introduced Special Agent Paul Maloney of the Drug Enforcement Agency to Yehuda. For the next eleven months, Maloney, acting in an undercover role, negotiated with Yehuda in an attempt to purchase large quantities of heroin. During these eleven months Maloney had approximately fifteen to sixteen telephone conversations and half a dozen "face-to-face" meetings with Yehuda. At each of the approximately six "face to face" meetings, Yehuda and Maloney tried to negotiate a heroin transaction. None of these transactions were ever consummated; the main sticking points were Yehuda's demand that Maloney give him money "up front" before delivery of the heroin, and Yehuda's apparent inability to obtain and produce any heroin despite his repeated promises. During these negotiations Yehuda stated that he had one source of heroin in Chicago and two in Thailand.

On February 24, 1987, Yehuda called Maloney at his Atlantic City office and said that "he had something" for Maloney. They agreed to meet the next afternoon at the Pennsylvania railroad station in Newark, New Jersey. They met as arranged. During the meeting Yehuda reported that

he had met "a friend" in New York whom he had previously seen in Thailand and that his friend had entered the United States with about five kilograms of heroin. Yehuda then gave Maloney a small package which later analysis revealed contained 23.6 grams of 27 percent pure heroin hydrochloride. Upon receiving the sample, Maloney told Yehuda that he would return with it to Atlantic City and have it tested; he added that if everything worked out well, he would want to buy at least one kilogram. Yehuda responded that the price would be about $200,000 per kilogram and that he would have to check with his friend to make sure everything was all right.

At this point, Maloney and Yehuda proceeded to a pay phone in the sky walk connecting the station and the Hilton Hotel. Maloney asked Yehuda if the transaction could be consummated in Atlantic City because he not only felt safer there but could also guarantee everyone else's safety. Yehuda replied that he would check this with "his man." Upon reaching the phone, Yehuda, referring to a piece of paper, punched in a series of numbers and hung up the phone. In response to Maloney's question as to whether the line was busy, Yehuda said that he had to call a beeper number and that his call would be returned. Maloney read from Yehuda's paper one of the numbers, 401–4532, that Yehuda had used. Several minutes later Yehuda received an incoming call on the pay phone. The call lasted several minutes and was carried out in a foreign language.

After this second call, Yehuda said that it was agreed that the transaction would be done in Atlantic City, but that his friend wanted to do it one pound at a time. Yehuda explained that "his friend" wanted Yehuda to deliver one pound to Maloney, receive $110,000, then go back to get the second pound and deliver it to Maloney in return for the remainder of the purchase price ($90,000). In response to Maloney's concern about completing the transaction anywhere but Atlantic City, Yehuda said that since Maloney was the buyer, "they" would complete it wherever he wanted.

The government subsequently obtained records from a Novotel Hotel in New York City which showed that a phone call had been made to the pay phone in the Newark skywalk at 1:44 pm on February 25, 1987 from a room registered to Annette Amar, an alias used by Yaffa Levy.

At 6:55 pm the next day, Levy, Gozlon–Peretz and Yehuda arrived together at the Sands Hotel; Levy rented room 1002 using an Israeli passport in the name of Annette Amar. The hotel desk clerk testified that she saw a full red bag among the defendants' luggage. At 7:05 pm Yehuda and Maloney met at an arranged spot in the Golden Nugget Hotel lobby; Yehuda was carrying a large red bag. After proceeding to Maloney's hotel room in the Golden Nugget, Yehuda stated that he had come to Atlantic City with "his friend" and asked Maloney if he had a balance that he could borrow as his had been too bulky to bring. Maloney lent Yehuda his electronic scale, and Yehuda put it into his red bag. Yehuda stated he was going to leave the scale with "his friend" while he, Yehuda, brought the first installment of drugs to Maloney. Yehuda was to have returned the scale with the second instaliment, at which point Maloney would have used the scale to weigh the total delivery. They then returned to the lobby and Maloney asked Yehuda if he wanted to call his friend prior to meeting him. Yehuda declined to call, stating that "his friend" was "there" and he would go "right to there." Appendix at 56.

Yehuda was followed by a detective Imfeld of the Atlantic City Police Department from the Golden Nugget Hotel to the Sands Hotel. Yehuda hired a taxi and took a very circuitous route back to the Sands Hotel, which included retracing his steps and making a "U" turn. Yehuda also repeatedly looked out the back window during the ride. When he arrived at the Sands Hotel he walked in circles and looked around the lobby for fifteen minutes. Yehuda then went to the elevator bank and waited for an empty elevator. Once in the elevator, Yehuda kept it on the ground floor for a "good minute" and then pushed the fifth and tenth floor buttons. After

the elevator went to the tenth floor it came straight down empty.

At 8:40 pm Yehuda, carrying the red bag still containing the scale, returned to the Golden Nugget. Yehuda told Maloney that "his friend" had told him that Yehuda must see or obtain at least half the money before proceeding further. Maloney replied that this was unsatisfactory and that they had already agreed on the structure of the exchange. Yehuda then said that "it was difficult, that he had no control over it, that he was—you know, he was caught in the middle." *Id.* at 57. Maloney told Yehuda that if he had to "front" the money, the sale was off, but he did ask Yehuda to call his friend and see if a compromise could be worked out. Yehuda went to a pay phone, asked Maloney to walk around, and then talked in a foreign language for less than five minutes. After the telephone conversation, Yehuda reported to Maloney that it might be possible for Yehuda to deliver 100 grams to Maloney, at which point Maloney would show Yehuda the money. Although Maloney agreed to this arrangement, Yehuda said that he had to await another phone call as he "hadn't spoken to the guy but had spoken to his girlfriend who was in the hotel room, that the man wasn't there and that she could only say that the guy would probably give [Maloney] a hundred grams." *Id.* at 58.

Yehuda received the return call at the pay phone shortly thereafter and talked for a couple of minutes in a foreign language. Upon completing the call, Yehuda reported to Maloney that "his friend" was adamant about seeing the money first and that if he did not the transaction would not be completed. Maloney rejected the new terms, made a counter offer, and asked Yehuda to call his friend again. Yehuda complied, using the same phone as before. Maloney reported that after Yehuda placed the call, he heard Yehuda ask for room 1002 in English. After this call, Yehuda reported that "his friend" would not agree to Maloney's suggestion. They then walked through the lobby arguing about the fact that Yehuda had agreed to complete the sale one way but was now changing the agreement. During this exchange, Yehuda said that he was as surprised as Maloney when the plans were changed and that "it was difficult being caught in the middle, that he was caught between two hard dealing people, that [Maloney] wouldn't bend and his friend wouldn't bend and that he hated doing business that way." *Id.* at 60.

At 10:55 pm Yehuda, carrying the red tote bag, rented room 1430 at the Sands Hotel using the name "Holly Berthold." At approximately 11:15 pm Maloney received a message on his beeper to call a certain number. The number was that of a pay phone in the lobby of the Sands Hotel; Yehuda answered it. Yehuda told Maloney that his "friend" had relented and that he was willing to do the transaction the way Maloney had suggested; the first installment, however, was to be only 250 grams Maloney agreed to these terms and arranged to meet Yehuda a little later.

Maloney and Yehuda met around 11:45 pm. Yehuda gave Maloney a package containing 185 grams of heroin. Moments later agents moved in and arrested Yehuda.

During the subsequent search of rooms 1002 and 1430 and the associated follow-up investigation, additional evidence was discovered. Two calls were placed from room 1002 to the pay phone Yehuda had been using the evening of February 26, 1987; one had been placed at 8:59 pm and the other at 9:55 pm. The times coincided with Yehuda's telephone conversations in Maloney's presence. During a search of room 1002, the following items were found: 1) a beeper, on a shelf near the bed with the number 401-4532 inscribed on its back; 2) foreign passports in the names of Pasquale DiStefano and Annette Amar; 3) two consecutively numbered Greyhound bus tickets from New York to Resorts International; and 4) a bill from the New York Novotel Hotel. A third Greyhound bus ticket, with a number consecutive with the two seized in room 1002, was found on Yehuda's person.

A search was also conducted of room 1430 rented by Yehuda using a passport issued in the name of Dert... Holly.[1] During the search 2,127 grams of 24 percent heroin hydrochloride and a red tote bag were recovered.

When questioned after their arrest, Gozlon-Peretz and Levy identified themselves by the aliases Pasquale DiStefano and Annette Amar respectively.

III.

A.

[1] Federal Rule of Evidence 801(d)(2)(E) provides that out of court statements made by a "coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay. The requirements of the rule are met if the person against whom the statement is offered participated in a conspiracy, the statement was made in furtherance of the conspiracy, and the conspiracy was still in progress at the time the statement was made. *Ammar*, 714 F.2d at 245; *United States v. Gibbs*, 739 F.2d 838, 843 (3d Cir.1984) (en banc), *cert. denied*, 469 U.S. 1106, 105 S.Ct. 779, 83 L.Ed.2d 774 (1985). As we have noted, before *Bourjaily* this court required the prosecution to demonstrate these three facts by a "fair preponderance of the independent evidence." *Gibbs*, 739 F.2d at 843 (quoting *United States v. Trotter*, 529 F.2d 806, 811-813 (3d Cir.1976)); *see Ammar*, 714 F.2d at 247. Thus, an out of court statement offered as a statement of a coconspirator was admissible only if evidence other than the statement itself made it more likely than not that the defendant participated in the alleged conspiracy and that the statement was made during and in furtherance of that conspiracy. *See Gibbs*, 739 F.2d at 843, (quoting *Trotter*, 529 F.2d at 812 n. 8). The trial judge in this case correctly identified this as the then governing standard.

Levy and Gozlon-Peretz assert that the independent evidence falls short of establishing by a preponderance of the evidence that they participated in a conspiracy with Yehuda. They do not dispute that if such a conspiracy were shown, the statements could be found to have occurred in furtherance and in the course of that conspiracy. Thus, in reviewing the district court's decision to admit Yehuda's statements under *Ammar*, our inquiry is restricted to "whether, viewing the [other] evidence in the light most favorable to the government, the district court had 'reasonable grounds' for concluding that, more probably than not, [the defendants] were coconspirators." *United States v. Inadi*, 748 F.2d 812, 817 (3d Cir.), *rev'd on other grounds*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986); *see United States v. Janotti*, 729 F.2d 213, 218 (3d Cir.1984), *cert. denied*, 469 U.S. 880, 105 S.Ct. 243, 244, 83 L.Ed.2d 182 (1984). We hold that the district court did have reasonable grounds for so concluding.

We start with the undisputed proposition that Yehuda went to Atlantic City in February of 1987 to offer for sale and deliver a substantial quantity of heroin. It is equally clear that Yehuda was accompanied on this trip by Levy and Gozlon-Peretz and that they occupied the same hotel room during most of the time the negotiations were ongoing. Accordingly, the issue for decision is whether there is independent evidence which, when added to Levy's and Gozlon-Peretz's association with Yehuda and their proximity to the transaction, permits an inference that they were involved in the selling of the heroin. We now turn to that evidence.

The independent evidence established that Yehuda repeatedly interrupted the negotiations to use the telephone and that he repeatedly changed his position immediately following such use. Two explanatory hypotheses have been advanced by the parties in connection with this evidence. Levy and Gozlon-Peretz suggest that Yehuda was negotiating solely on his own account and was using the apparent telephone calls as a ruse to put himself in a better bargaining position. The government, on the other

1. The hotel clerk apparently miscopied the name in Yehuda's false passport, misreading Holly Berthold for Derthon Holly.

hand, urges that Yehuda was acting as a broker whose role was to bring Maloney together with a party who had a large quantity of heroin to sell. Based on the independent evidence, we conclude that the district court could properly infer that Yehuda was not dealing on his own account and that the calls involved conversations with co-conspirators. Moreover, having drawn this inference, we believe the district court had ample reason to further conclude that Levy and Gozlon-Peretz were the co-conspirators whom Yehuda contacted by telephone.

First, with respect to Yehuda's role in the transaction, we find it significant that during the eleven months leading up to the February sale, Maloney had been attempting unsuccessfully to purchase heroin from Yehuda. Despite many promises to provide Maloney with samples, Yehuda had never been able to produce any heroin. In fact, one of the sticking points between Maloney and Yehuda in their negotiations was Maloney's refusal to finance Yehuda's excursions abroad to obtain heroin and arrange for suppliers. If Yehuda had had the ability to supply heroin on his own account, it would seem likely that he would have fulfilled his promises and delivered heroin to Maloney during their many dealings in 1986. His failure to do so is supportive of the inference that he was not dealing on his own account in February of 1987.

In addition, the nature of the sticking points in the February 25th and 26th negotiations were not over price or purity, as one would expect if Yehuda were the supplier trying to use clever bargaining strategy to increase his profits; rather Yehuda and Maloney haggled over who should perform first. Yehuda wanted Maloney to pay before he delivered the drugs, and Maloney wanted the transaction done in two steps, with half of the drugs being exchanged for half the money at each stage. These disagreements are more characteristic of a broker taking instructions from a cautious supplier who did not know or trust the buyer, than of a supplier trying to drive a hard bargain with a known purchaser.

Finally, the district court was entitled to credit Maloney's evaluation that Yehuda was genuinely frustrated by finding himself "caught in the middle" and unable to consummate the transactions as planned. That frustration is supportive of the inference that Yehuda was not dealing solely on his own account and that the telephone calls were conversations with his co-conspirators.

Second, with respect to the identity of Yehuda's co-conspirators, we find the inference for which the government contends compelling. The first call made by Yehuda in Newark was placed to a beeper later found in the Sands hotel room engaged by Levy and occupied by Levy and Gozlon-Peretz. That call was returned from the New York Novotel Hotel room also occupied by them. Likewise, in Atlantic City, Yehuda made at least one call to room 1002 and two of his other calls were returned from that room.

Moreover, there are three other indications that Levy and Gozlon-Peretz were the ones in league with Yehuda. It can be inferred that the 'counter surveillance' techniques used by Yehuda on his way to the Sands Hotel from his 7:05 pm meeting with Maloney were an attempt to protect the people and drugs in room 1002 from detection. In addition, the absence of other contacts between Yehuda and third parties, as revealed by police surveillance, tends to exclude the likelihood of an unknown third party being the supplier. Finally, the 'guilty consciousness' demonstrated by Levy and Gozlon-Peretz in giving false names upon arrest also tends to indicate that they were not just innocent bystanders vacationing in Atlantic City.

For these reasons, we conclude that there was sufficient independent evidence to make it more likely than not that Levy and Gozlon-Peretz were participants with Yehuda in a conspiracy to distribute heroin. We find that independent evidence every bit as probative of a conspiracy as the independent evidence in *Gibbs*, 739 F.2d 838, and in *United States v. Leon*, 739 F.2d 885 (3d Cir.1984). Contrary to appellants' contention, we also find our conclusion entirely consistent with *United States v. Wexler*, 838 F.2d 88 (3d Cir.1988), in which the court concluded that a defendant who aided in the transportation of a truck containing illegal drugs did not have reason to know that the truck contained anything other than stolen goods. First, in this case, unlike *Wexler*, there is evidence from which one can rationally infer that the defendants were the suppliers of the drugs. Second, in *Wexler* the government had to show enough evidence to support a *conviction*, a far heavier burden than it labors under here.

B.

[2] Levy insists that the district court erred in admitting evidence of her possession of a passport issued in the name of Annette Amar and of her use of that fictitious name. Making reference to the "international traveling statutes," she characterizes this evidence as "other crimes evidence" and asserts that, even if it has some relevance, its probative value is outweighed by its potential for undue prejudice. Gozlon-Peretz makes a similar argument. We are unpersuaded.

The use of false passports and identities by the defendants is relevant for at least three reasons. First, defendant Levy's use of her "Annette Amar" alias in checking into the two hotel rooms, supports the government's contention that she was the "front person" for Gozlon-Peretz and Yehuda, protecting their identities while they completed the heroin sale. If the sale had been consummated as planned, the only direct link to Gozlon-Peretz would have been the fading memory of the Sands Hotel desk clerk. Thus, the use of the false identity could be seen as part of the defendants' plan in implementing the conspiracy, a safety measure to protect Gozlon-Peretz in case the buyer was later arrested. Second, the defendants' attempt to conceal their true identities by providing aliases to the police upon arrest is relevant as consciousness of guilt. *United States v. Kalish*, 690 F.2d 1144, 1155 (5th Cir.1982), *cert. denied*, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958; *see also United States v. Boyle*, 675 F.2d 430 (1st Cir.1982); *Leon*, 739 F.2d at 893 n. 19. Finally, the use of false identities by all three conspirators also tended to show joint planning and coordination by the defendants in an attempt to protect themselves from future investigation and pursuit.[2]

Federal Rule of Evidence 404(b) was not violated because the challenged evidence thus tended to show preparation, plan, and state of mind. Similarly, we conclude that Rule 403 was not breached because this evidence had significant probative value and very little, if any, potential for undue prejudice. Evidence of illegal entry into the United States is not likely " 'to suggest a decision on an improper basis, [for instance] an emotional one.' " *Weinstein's Evidence*, ¶ 403[03] (quoting the Advisory Committee's Note to Rule 403). Nor is it likely to arouse the jury's sense of horror, provoke its instinct to punish, or lead the jury to base its decision on something other than the established facts in the case. *Id.* at ¶ 403[03]. The trial judge clearly did not abuse his discretion in admitting this evidence.

C.

In evaluating Levy's and Gozlon-Peretz's argument that all the above facts, considered together, do not show that they had the requisite knowledge and intent to convict them of the crimes charged, we must decide "whether, viewing the evidence most favorably to the government, there is substantial evidence to support the verdict." *Wexler*, 838 F.2d at 90. We find that the record contains the requisite support.

[3] In Levy's case, she used a false name both to rent the hotel rooms, which were used as 'command posts,' and to mislead the police after she was arrested. She traveled to Atlantic City with Gozlon-Per-

2. Yehuda used several false names during his dealings with Maloney. At the times Yehuda called Maloney he usually identified himself as "George," when he checked into hotels in New Jersey he told Maloney to ask for "Mr. Sabag," and when he arrived in New Jersey in February of 1987 he used the name of Berthold Holly to rent room 1430 at the Sands Hotel.

etz and Yehuda, Gozlon-Peretz stayed with her in both rooms, Yehuda called the rooms she had rented during the course of the negotiations, and Gozlon-Peretz used those rooms to return Yehuda's calls. Moreover, it might also be inferred that the drugs were kept in the room she had rented at the Sands Hotel for most of the negotiating period on February 26, 1987.[3] And most importantly, Levy received a phone call from Yehuda, proposed a compromise to keep the transaction alive, and passed the proposed compromise on to Gozlon-Peretz.

This evidence supports the jury's conclusion that Levy not only had knowledge of the conspiracy but also played a significant role in bringing it to fruition.

[4] The evidence supporting Gozlon-Peretz's conviction is stronger than that supporting Levy's. Not only did he travel to Atlantic City with Levy and Yehuda, aid in engaging room 1002, occupy the "command posts" with Levy and give a false name to the police, but the jury was also entitled to infer from Yehuda's many co-conspirator statements that Gozlon-Peretz was the supplier of heroin who used Yehuda to dictate the terms of the sale.

D.

[5] We now turn to the question of whether error was committed in the sentencing of Gozlon-Peretz and Yehuda. Gozlon-Peretz was sentenced on Count Three to twenty years in prison, a Special Parole Term of five years, a "stand committed" fine of $200,000 and a $50 Special Assessment. The court also imposed concurrent twenty year terms on Counts One and Two, a Special Parole Term under Count Two, and additional Special Assessments.

On Count Three, Yehuda was sentenced to twenty years in jail, a Special Parole Term of five years, a "stand committed" fine of $200,000, and a Special Assessment of $50.

After sentence was imposed, the Assistant U.S. Attorney sought to clarify the import of Gozlon-Peretz's sentence under the new drug sentencing laws and engaged in the following exchange with the sentencing judge:

> Is it my understanding that Count 3, being the more severe count, that the defendant is also sentenced to a mandatory minimum term of ten years in prison, which he must serve without probation or parole; and that on Count 2 that there is a minimum of five years, which he must serve without probation or parole; is that correct, Judge?

Appendix at 291. To which the judge replied, "[t]hat's correct. That's correct." *Id.*

[6] The prosecutor's statement of the parole consequences of the sentence imposed was not correct. The relevant sentencing provisions, as revised in October 1986,[4] state that "[n]o person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein." 21 U.S.C. § 841(b)(1)(A)(i), (b)(1)(B)(i). Thus, with respect to at least two of his twenty year sentences,[5] Gozlon-Peretz is not entitled to be considered for parole at any time.

Based upon the exchange be[illegible]n the prosecutor and the court, there [illegible] unacceptable risk that at least two of Gozlon-Peretz's current sentences are the result of a misconception concerning their legal effect. Accordingly, under *United States v. Katzin*, 824 F.2d 234, 240 (3d Cir.1987) ("sentencing on the basis of materially untrue assumptions violates due process") (citing *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972)); *United States v. Kerley*, 838 F.2d 932, 941 (7th Cir.1988) (remand for resentencing required when sentence may have been based on legal and factual misunderstandings), Gozlon-Peretz is entitled to have his sentences on Counts Two and Three vacated.[6] We will vacate Gozlon-Peretz's sentences and will remand for resentencing.

Yehuda's sentence, imposed on the same day as Gozlon-Peretz's, was similarly flawed.[7] We will also vacate Yehuda's sentence and remand for resentencing.

In addition, Yehuda also challenges the "stand committed" fine of $200,000 imposed on him by the district court judge in the absence of any factual findings regarding his ability to pay that fine. The judge ordered that the "defendant ... stand committed until the fine is paid or he is otherwise discharged by due p[illegible]s of law." We confess to some uncerta[illegible]y as to what the judge intended by this language. Given that the judge apparently believed Yehuda was destined to spend a minimum of ten years in prison without regard to whether the fine was paid, the reference to a discharge by due process of law may reflect an anticipation on his part that Yehuda could raise any "ability to pay" issue in a subsequent proceeding if a failure to pay the fine ever became the sole reason for his incarceration.

[7] Because of our disposition of the other sentencing issue, we find it unnecessary to decide whether the district judge's failure to make a finding regarding Yehuda's ability to pay was reversible error in this context. When the district court holds a resentencing hearing for Yehuda following remand, it will have before it a defendant who was determined at the commencement of this appeal to be unable to pay court costs. With indigency having been so established, we think it likely that the district court either will decline to impose a "stand committed" fine or will accompany

3. The drugs had to be somewhere when Yehuda met with Agent Maloney at 7:05 pm. The most probable place would be in the room that his likely suppliers had rented, especially given the permissible inference that he went to room 1002 after telling Maloney that he was going to leave the scale with "his friend" so that the friend could measure out the drugs before delivery. Yehuda only rented room 1430, where the rest of the drugs were found, at 10:55 pm.

4. The provisions of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, §§ 1002 & 1003, amending the relevant aspects of 21 U.S.C. § 841(b)(1) became effective immediately upon the signature of the President on October 27, 1986. *U.S. v. Meyers*, 847 F.2d 1408 (9th Cir.1988); U.S. Dept. of Justice, *Handbook on the Anti-Drug Abuse Act of 1986*, at ix (Crim.Div.1987).

5. It is doubtful whether Gozlon-Peretz's twenty year sentence on Count One, which alleges a conspiracy to distribute heroin in violation of 21 U.S.C. § 846, implicates the provisions of the Anti-Drug Abuse Act of 1986 prohibiting parole. See, *Handbook on the Anti-Drug Abuse Act of 1986*, at 17-20; *United States v. Jureidini*, 846 F.2d 964 (4th Cir.1988). We need not decide this issue, however, because where the sentences imposed on two of three counts are vacated and all three sentences arise from the same criminal transaction, it is appropriate to vacate the third, valid sentence, *see, United States v. Rosen*, 764 F.2d 763 (11th Cir.1985), *cert. denied*, 474 U.S. 1061, 106 S.Ct. 806, 88 L.Ed.2d 781 (1986), in order to afford the trial judge an opportunity to properly exercise his sentencing discretion, *United States v. Grayson*, 795 F.2d 278, 287 (3d Cir.1986), *cert. denied*, 481 U.S. 1018, 107 S.Ct. 1899, 95 L.Ed.2d 505 (1987) and to "reduce the possibility of disparate and irrational sentencing." *United States v. Busic*, 639 F.2d 940, 948 (3d Cir.), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981); *cf. United States v. Hawthorne*, 806 F.2d 493, 499-501 & n. 14 (3d Cir.1986).

6. In view of our decision on this issue we need not reach appellant Gozlon-Peretz's claim of ineffective assistance of counsel during the sentencing phase.

7. The following colloquy occurred with respect to Yehuda:

> THE COURT: ... It is adjudged on Count 3 that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for a *term of 20 years* plus five years special parole, and is fined two hundred thousand dollars. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due process of law. Special assessment of 50 dollars is imposed.
>
> ....
>
> Asst. U.S. Atty.: Yes Judge. But first one additional inquiry. Am I given to understand that the court also has imposed a *ten year mandatory minimum*, which the statute requires in this instance?
>
> THE COURT: I have on my presentence investigation report the penalty as five years special parole.
>
> Asst. U.S. Atty.: Judge, with the amount that he pleded [sic] guilty to it was—*no, I'm talking about the mandatory minimum of the incarceration.* There is a five years [sic] mandatory special parole, but the offense to which the defendant pleaded guilty carries a ten year mandatory minimum.
>
> THE COURT: The ten year mandatory minimum takes care of that.
>
> Asst. U.S. Atty.: Does it?
>
> THE COURT: Correct, its a statutory minimum. [sic]

Appendix to Yehuda's Brief at 46-47 (emphasis added).

the imposition of such a fine with an explanation of its purpose. Clearly, that would be the preferable practice in these circumstances.[8]

IV.

Since the evidence challenged by Levy and Gozlon-Peretz was properly admitted and as there was sufficient evidence to support their convictions for the crimes charged, we will affirm their convictions. We will vacate Yehuda's and Gozlon-Peretz's sentences and remand for resentencing.[9] Levy's sentence will be affirmed.

FIRST AMERICAN SAVINGS, FA

v.

M & I BANK OF MENOMONEE FALLS

Appeal of FIRST AMERICAN SAVINGS, F.A.

No. 88-1214.

United States Court of Appeals, Third Circuit.

Argued Aug. 17, 1988.

Decided Jan. 9, 1989.

Depositary bank sued paying bank for losses incurred in connection with check which had been dishonored. The United States District Court for the Eastern District of Pennsylvania, Clarence C. Newcomer, J., 685 F.Supp. 473, entered judgment in favor of paying bank, and appeal followed. The Court of Appeals, Stapleton, Circuit Judge, held that paying bank was liable to depositary bank for failing to give notice of dishonor within time limits prescribed by federal regulations, even though it was subsequently determined that depositary

8. There is general agreement that a district court has authority to impose a "committed fine," that is a fine which will result in incarceration until payment is made. *See, e.g., Hill v. U.S. ex rel. Wampler*, 298 U.S. 460, 56 S.Ct. 760, 80 L.Ed. 1283 (1936). The purpose of such a fine, however, is to assist enforcement of the order imposing it, *e.g., Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), a purpose that is not served by the imposition of a "committed fine" on an indigent defendant. The Court of Appeals for the Ninth Circuit, however, has held that, though an indigent defendant may not ordinarily be incarcerated for non-payment of a fine, this principle does not impair the validity of a judgment containing a committed fine if there is reason to believe that the defendant's ability to pay will be determined before the defendant is held solely on the basis of the non-payment of the fine. *United States v. Estrada de Castillo*, 549 F.2d 583 (9th Cir.1976); *United States v. Miller*, 588 F.2d 1256 (9th Cir. 1978). The argument in favor of this position sanctioning reliance on a subsequent determination of the defendant's ability to pay becomes stronger where, as here, there is a lengthy term of imprisonment in addition to the fine. Nevertheless, the likelihood of a material increase in assets during incarceration normally will not be substantial and, if there is any reason at the time of sentencing to question whether the defendant is financially responsible, we think it at least prudent for the sentencing judge to address the ability-to-pay issue before imposing a committed fine. If the court's decision is in favor of imposing such a fine, its supporting findings will be of assistance in the event the fine ultimately becomes the only basis for detaining the defendant. If the court decides against a committed fine because of the defendant's financial position or for any other reason, the possibility of a commitment to incarceration remains open, of course, if it can later be shown that the defendant has failed to pay despite an ability to do so. *See Tate v. Short*, 401 U.S. 395, 400, 91 S.Ct. 668, 671, 28 L.Ed.2d 130 (1971).

9. Given our decision to remand for resentencing, we need not reach Yehuda's Eighth Amendment argument.

74

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

THE CLERK
on 4-21-1989
WILLIAM T. WALSH, CLERK
By (Deputy Clerk)

ORIGINAL FILED
1989

UNITED STATES OF AMERICA :

vs :

MOSHE GOZLON-PERETZ :

CRIMINAL 87-00080 (03)

J U D G M E N T

The Defendant having been convicted of the offenses of Conspiracy to distribute and possess with intent to distribute Heroin(Schedule I), of distributing Heroin (Schedule I), and of possessing with intent to distribute Heroin (Schedule I); and

It having been Ordered on August 14, 1987, that on Count 3, that the defendant be imprisoned for a period of 20 years, and a special parole term of 5 years, and pay a Fine of $200,000.00, and pay a Special assessment of $50.00, and that the defendant stand committed until the fine is paid or he is otherwise discharged by due course of law; and on Count 2, the defendant be imprisoned for a period of 20 years, and special parole term of 5 years, and pay a special assessment of $50.00; and on Count 1, the defendant be imprisoned for a period of 20 years and pay a special assessment of $50.00, and that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to sentence imposed on Count 3, and the total term of imprisonment is 20 years, with 5 years of special parole term, and pay a total fine of $200,000.00 and pay a total special assessment of $150.00:

It Is, on this 14th day of April, 1989,

ORDERED that the Judgment and Commitment imposed on August 14, 1987, is hereby Vacated; and it is hereby ORDERED that on Count 3 that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of Fifteen (15)Years, plus Five(5)Years Special Parole, and that he pay a Fine of $200,000.00 and pay a special assessment of $50.00; and On Count 2 that the defendant is hereby committed for imprisonment for a period of Fifteen(15)Years, plus Five(5)Years of Special Parole and that he pay a special assessment of $50.00; and that on Count 1 that the defendant is hereby committed for imprisonment for a period of Twenty(20)Years, and pay a special assessment of $50.00; and that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to that imposed on Count 3. In summary, total term of imprisonment is Twenty (20) Years, plus Five(5)Years Special Parole, Total Fine is $200,000.00, and Total Assessment is $150.00.

App. C.

IT IS FURTHER ORDERED that the Clerk deliver two certified copies of this JUDGMENT AND COMMITMENT to the United States Marshal or any other qualified officer and that a copy serve as the commitment of the defendant.

JOHN F. GERRY, CHIEF JUDGE, U. S. D.

No. 89-

IN THE UNITED STATES SUPREME COURT

October Term, 1989

MOSHE GOZLON-PERETZ

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

CERTIFICATE OF SERVICE WITH FILING BY MAIL

Pursuant to this Court's Rules 29.2 and 29.5(b), I certify that I am a member of the Bar of this Court, representing the petitioner. I further certify that:

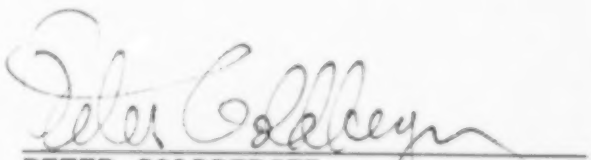
1. On April 25, 1990, within the time permitted by law for filing this Petition, I mailed the original of the Petition (together with a Motion for Leave to Proceed in Forma Pauperis), by certified mail with return receipt requested, postage prepaid, and properly addressed to the Clerk of this Court.

2. I further certify that on April 25, 1990, at the time of filing, as permitted by Rule 29.3, I served the foregoing Petition for Certiorari on counsel for the respondent United

States, the Solicitor General, whose telephone number is (202) 633-2201, by placing a copy in the U.S. Mails, certified with return receipt requested, postage prepaid, and addressed to:

Solicitor General
Department of Justice
Washington, DC 20530

As a result, I state pursuant to Rule 29.5 that all parties required to be served have been served.



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